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Are EU dawn raid procedures on a collision course with the ECHR? Does a cautionary tale from Canada offer guidance?*

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Introduction

There is a striking contrast between Canada and the European Union (EU) with respect to the authorities' ability to search computers and mobile phones – and this contrast invites exploration, comparison, review and comment. Specific and prior authorisation to search computers and mobile phones[1] is required in Canadian law except for searches incident to arrest in narrowly defined instances.[2] This position differs dramatically with sweeping inspections of data in EU competition law investigations where no specific authorisation is needed to search electronic devices in the course of a dawn raid.[3]

This paper compares the law in Canada regarding searches of electronic data where the Supreme Court of Canada (SCC) ruled in 2013 that specific and prior authorisation is required to search a computer (including mobile phones). The law was refined by the SCC in 2014 to allow for warrantless searches of mobile phones incident to arrest provided specific safeguards are adopted. The law in Canada is polar opposite to EU law[4] where no expectation of computer privacy and no specific authorisation are afforded for inspections of electronic devices

*The views expressed in this article are strictly those of the author and no way necessarily reflect the policies or opinions of anyone else. He thanks his friends and colleagues Shane Zurbrigg and Sally Arsove for their helpful comments on an earlier draft. This article was completed in November 2016.
[1]Referred to in Canada as cellular phones or cell phones.
[2]Or warrantless searches in exigent circumstances, for example, to prevent an imminent threat to safety.
[3]A dawn raid is an unannounced inspection of premises carried out by the European Commission in accordance with Article 105 of the Treaty on the Functioning of the European Union (TFEU). Officials will normally be aided by representatives from the national competition authority.
[4]This is not the only instance where Canadian and EU law differ. In Canada, in-house counsel and their client benefit from solicitor-client privilege (referred to as legal professional privilege in the EU), whereas in-house legal advisers and their client do not benefit from similar protections in the EU. See in this regard, Gavin Murphy, 'Is It Time to Rebrand Legal Professional Privilege In EC Competition Law? An Updated Look' (2009) 35 CLB 443.

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Notes

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[5] The Commission is the executive branch of the EU and one of its responsibilities is developing rules and regulations regarding competition policy and enforcing those provisions.

[6] Formally known as the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[7] Query: In light of the Court of Justice of the European Union (CJEU) Opinion 2/13 of 18 December 2014, should this question be recast as an 'if'? See below.

[8] R v Vu, 2013 SCC 60, [2013] 3 SCR 657 <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13327/index.do> accessed 21 October 2016.

[9] Competition Act, RSC 1985, c C-34, as amended.

[10] For further details on the Vu case, see Gavin Murphy, 'Supreme Court of Canada establishes that specific authorisation is needed for computer searches in Canada – will the European Union follow suit?' [2014] ECLR 322; Gavin Murphy, 'The Canadian Supreme Court Rules That Specific Authorisation Needed to Search Computers and Mobile Phones', e-competitions, No 62303, January 2014 <https://www.concurrences.com/bulletin/news-issues/November-2013/Th-Supreme-Court-of-Canada?lang=en> accessed 22 October 2016.

[11]

[11] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

[12] Justice Cromwell noted at para 38 of the judgment that mobile phones are similar in function and storage capacity to computers and that the term 'computer' in the judgment should be understood to cover these devices. See also s 31.8 of the Canada Evidence Act RSC 1985 c C-5 for a definition of 'computer system'.

[13] According to Justice Cromwell at para 41 of the judgment, the SCC was advised that as of April 2009 the highest capacity commercial hard drives could store two terabytes of data. One terabyte can hold about 1,000,000 books of 500 pages each, 1000 h of video or 250,000 songs of four minutes. An 80 gigabyte desktop drive can store the equivalent of 40,000,000 pages of text. Hard drive sizes have increased since 2009 and two terabyte drives are now readily and cheaply available commercially. Larger drives are also available, but they are more expensive.

[14] Vu at paras 40, 45 and 47.

[15] Vu at para 51.

[16] Query: Could seizing an entire computer hard drive for an extended period of time disproportionally prejudice a person? Could police potentially abuse their power? But to fit within s 8, the seizure would need to be reasonable, thus mitigating against unreasonable seizures or abusive behaviour. But this may not necessarily be the case in the EU. See below.

[17] Section 24(2) of the Charter says: 'Where … a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.'

[18] R v Fearon, 2014 SCC 77, [2014] 3 SCR 621 <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14502/index.do> accessed 21 October 2016.

[19] A voir dire in this case would have been a trial within the main trial held separately to determine the admissibility of contested evidence.

[20] Fearon at paras 3 and 4.

[21] These valid law enforcement objectives include protecting the police, the accused and the public, preserving evidence and discovering evidence such as locating additional suspects, where the investigation could be stymied or significantly hampered without the power to search the mobile incident to arrest.

[22] These three approaches are a categorical prohibition, a reasonable and probable grounds requirement and limiting searches to exigent circumstances.

[23] See n 21 above.

[24] Query: Vu involves the search of computers at a private residence. Can it be distinguished from computer searches of business premises? The overwhelming majority of searches in Canadian competition law take place at business premises.

[25] Unlike specific reference to tablets and the cloud in the EU. See below.

[26] The situation is even more restricted in the USA. In Riley v California 134 S Ct 2473 (2014), the US Supreme Court unanimously held that a warrantless search and seizure of electronic data on a mobile phone incident to arrest was unconstitutional. This case was referred to in the Fearon decision.

[27] The key criminal law offences being conspiracy and bid-rigging. Obstructing a validly authorised search could also result in criminal charges. See s 64 of the Act.

[28] Fearon at para 79.

[29] A justice of the peace (not a judge) authorises search warrants under the Act.

[30] 'The Bureau has on staff trained electronic evidence officers. They have specialized knowledge and skills which allow them to access computer systems to search for, examine, retrieve, reproduce and seize electronic data. They adhere to accepted forensic practices and procedures designed to ensure the integrity of the evidentiary process for obtaining and maintaining electronic records, and the integrity of electronic media from which they are sourced, while attempting to minimize the impact on business functions.' Competition Bureau, 'Information Bulletin on Sections 15 and 16 of the Competition Act' at p 14, 25 April 2008 <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Section-1516-final-e.pdf/$FILE/Section-1516-final-e.pdf> accessed 22 October 2016.

[31] G Pinsonnault and P-C Collins Hoffman, 'Canada: The Supreme Court's Decision in R. v. Vu: A Specific Authorization is Required To Conduct The Search Of Computer Or Cell Phone Data,' McMillan, 13 November 2013 <http://www.mcmillan.ca/Files/176105_The%20Supreme%20Court's%20decision%20in%20R.%20v%20Vu.pdf> accessed 22 October 2016.

[32] European Commission, 'Explanatory note to an authorisation to conduct an inspection in execution of a Commission decision under Article 20(4) of Council Regulation No 1/2003,' 18 March 2013.

[33] 'Business executives should therefore be prepared that they may have to hand over to the inspectors their blackberry and /or smartphone during an inspection. They may be requested for passwords for these items and a forensic copy of the data on these devices may be made. They should be prepared to manage their work schedule without these devices for several hours, and at worst until the end of the raid (which may last as long as three days).' Peter Citron (ed), 'European Commission dawn raids – IT searches,' Kluwer Competition Blog, 25 March 2013 <http://kluwercompetitionlawblog.com/2013/03/25/european-commission-dawn-raids-it-searches/> accessed 22 October 2016. (Providing personal devices to inspectors is now mandated. See below.).

[34] Article 20(4) says: 'Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 23 and 24 and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted.'

Council Regulation (EC) No 1/2003, Official Journal of the European Communities L, pp 1–25, 4 January 2003 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R0001&from=en> accessed 22 October 2016.

[35] Article 20(2) says: 'The officials and other accompanying persons authorised by the Commission to conduct an inspection are empowered: (a) to enter any premises, land and means of transport of undertakings and associations of undertakings; (b) to examine the books and other records related to the business, irrespective of the medium on which they are stored; (c) to take or obtain in any form copies of or extracts

from such books or records; (d) to seal any business premises and books or records for the period and to the extent necessary for the inspection; (e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.'

[36] European Commission, 'Explanatory note on Commission inspections pursuant to Article 20(4) of Council Regulation No 1/2003', 11 September 2015 <http://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf> accessed 22 October 2016.

[37] 2015 Commission explanatory note at paras 9–11.

[38] Notwithstanding the principle of proportionality in EU law.

[39] It is nonsense to think that business data would not be comingled with personal information on private devices in all instances. On the other hand, the Commission implies that inspections would be practically meaningless if private devices were not subject to examination.

[40] Undertakings and legal advisers should develop a reasonable and workable process to identify privileged materials to shield them from inspection while at the same time allowing the search to continue uninterrupted.

[41] Not an EU institution like the CJEU.

[42] Robathin v Austria, Case 30457/06, 3 July 2012, European Court of Human Rights <http://hudoc.echr.coe.int/eng?i=001-111890> accessed 25 October 2016.

[43] M Michalek, 'Fishing Expeditions and Subsequent Electronic Searches in the Light of the Principle of Proportionality of Inspections in Competition Law Cases in Europe,' Yearbook of Antitrust and Regulatory Studies, vol 2014, 7(10) 129 at 157 <http://www.yars.wz.uw.edu.pl/yars2014_7_10/129.pdf> accessed 22 October 2016. See Case C-583/13 P Deutsche Bahn AG v Commission, 18 June 2015, confirming that the Commission must restrict a dawn raid to matters covered in an inspection decision, i.e. it cannot go on a fishing expedition <http://curia.europa.eu/juris/document/document.jsf?text=&docid=165109&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=231192> accessed 24 October 2016. Query: How would this finding play out in

instances where the Commission removed a copy of a hard drive to its premises for a later examination?

[44] The Maastricht Treaty in Title 1 Common Provisions Article F 2 says: 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.' Official Journal of the European Communities, 92/C 191, pp 1–112, 29 July 1992 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1992:191:FULL&from=EN> accessed 24 October 2016.

[45] Article 6.2–6.3 of the Treaty on European Union says: '2. The [European] Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

[46] If not already with the Charter of Fundamental Rights of the European Union and in particular the personal freedoms (Respect for private and family life) found in Article 7. This Charter was made binding on EU institutions and Member States by the Treaty of Lisbon when acting within the scope of EU law. See also Article 52(3), which says: 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.' The EU is currently in the odd position of having overlapping jurisdiction with respect to human rights with two texts, the Charter of Fundamental Rights of the European Union and the ECHR, and two corresponding courts, namely the CJEU and the ECtHR. For an excellent discussion on the tension between the CJEU and the ECtHR and the application of the Charter of Fundamental Rights of the European Union, see G de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?', (2013) 20 MJ 2 168 <http://www.maastrichtjournal.eu/pdf_file/ITS/MJ_20_02_0168.pdf> accessed 25 October 2016.

[47] See Niemietz v Germany [1992] ECHR 80 <http://www.worldlii.org/eu/cases/ECHR/1992/80.html> accessed 22 October 2016.

[48] Opinion pursuant to Article 218(11) TFEU – Draft international agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the draft agreement with the EU and FEU Treaties, 18 December 2014 <http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=EN> accessed 25 October 2016.

[49] A O'Neill, 'Opinion 2/13 on EU Accession to the ECHR: The CJEU as Humpty Dumpty,' 18 December 2014 <https://eutopialaw.com/2014/12/18/opinion-213-on-eu-accession-to-the-echr-the-cjeu-as-humpty-dumpty/> accessed 22 October 2016.

[50] A considerable body of jurisprudence has already developed in Canada with provincial and appeal courts applying the principles laid down in Vu and Fearon. For further details on these cases see the Canadian Legal Information Institute (Can LII) <http://www.canlii.org/en/index.php> accessed 25 October 2016.

[51] Not to mention Riley v California. See above.

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